LRB File No. 106-23

IN THE MATTER OF AN APPEAL TO AN ADJUDICATOR PURSUANT TO SECTIONS 3-53 AND 3-54 OF *THE SASKATCHEWAN EMPLOYMENT ACT*

BETWEEN

KATHARINE KAZAKOFF

APPELLANT

- and -

QSI INTERIORS LTD.

RESPONDENT

Adjudicator: Larry B. LeBlanc, K.C.
For the Appellant: Self-Represented
For the Respondent: Miranda Wasstrom, Corporate Safety Facilitator, QSI Interiors Ltd.

DECISION

I. INTRODUCTION

[1] On March 27, 2023, the Appellant, Katharine Kazakoff, filed a complaint of discriminatory action against the Respondent, QSI Interiors Ltd., in connection with her layoff from employment with the Respondent approximately three years before, on March 18, 2020.

[2] The complaint was investigated by two Occupational Health Officers who, in a decision dated June 27, 2023, determined that the layoff was not an unlawful discriminatory action contrary to section 3-35 of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 (the "Act").

[3] On July 11, 2023, the Appellant gave notice of appeal from that decision as provided for in sections 3-53 and 3-54 of the Act. I was selected as adjudicator for the appeal on October 27, 2023. An appeal file containing material as described in section 3-55 of the Act was provided to me by the Director of Occupational Health and Safety on November 9, 2023. Copies were then forwarded to the parties.

[4] Following a pre-hearing meeting by conference call and the re-scheduling of an earlier intended hearing date, the appeal came on for hearing on May 29, 2024. The appeal was heard by video conference as agreed by the parties. No objections or issues of a preliminary or jurisdictional nature were raised by either party.

[5] For the reasons that follow, I have concluded that the appeal must be dismissed.

II. BACKGROUND

[6] The Respondent is a contractor focused on interior construction including drywall work on commercial and industrial projects in Manitoba, Saskatchewan and Alberta. It has offices in five cities including Regina.

[7] The Appellant commenced employment with the Respondent in its Regina branch on March 11, 2019 in the position of Taper. The Appellant had previously worked for the Respondent both as an employee and a subcontractor at various of its locations.

[8] The Appellant sustained a workplace injury on March 19, 2019. A return to work program was developed in conjunction with a claim for workers' compensation benefits. On March 18, 2020, the Appellant was laid off from her employment with the Respondent.

[9] The Appellant's complaint is contained in a completed form of questionnaire signed on March 27, 2023. The form of questionnaire asks, "What was the alleged discriminatory action taken against you?". The Appellant in response stated:

> I feel that Jamie layed me off and he never let me finish my tertiary program through the WCB physio therapist.

The manager of the Respondent's Regina branch was Jamie Stercl.

[10] The Appellant also referred in that section of the questionnaire to an attached "next page" which states:

> Wed 16th July – 2019
>
> While taping blueprints – I heard TAMARA say to Jamie, you have a letter from WCB – In that next 10 minutes, I moved to boardroom (in the dark) Jamie came up to TAMARAS CUBICLE, and said – I would like to punch out that sub drywaller. It went silent – I kept my head down – he paced 3 times past the board room and he finally looked in with this horrible look on his face, and said what are you doing in there, I looked at him and said Joe told me to take a break in the board room, the lights are too bright. he walked away.

[11] The form questionnaire further asked "On what date, and to whom, did you raise your health concern and safety concern/complaint prior to the action taken against you? The Appellant's in response stated as follows:

> 2 day after incident I spoke with Don Hale [the words "Field Supervisor" are then inserted with an arrow] and gave him a note on what happened. The note was because he always had people around him, but I was still able to speak to him.

[12] The Occupational Health Officers informed the Respondent of the above allegations in a letter dated May 17, 2023. In the letter, the Officers asked the Respondent to provide documentation identifying the reasons for the layoff along with a copy of the current harassment policy.

[13] The Respondent answered by letter dated May 25, 2023 from Miranda Wasstrom, Corporate Safety Facilitator, which letter included the following:

> Katharine Kazakoff was rehired on March 11, 2019 for the position of a Taper. Shortly after being hired, on March 19, 2020 [corrected to March 19, 2019 at the hearing] Katharine Kazakoff was working at a work-site as a Taper and sustained a workplace injury ... During the entirety of this one year claim, QSI Interiors Ltd. supported and accommodated her abilities. Throughout the claim, Katharine Kazakoff had access to and completed multiple Physiotherapy and Physical Rehabilitation Programs as approved by WCB. Katharine Kazakoff's physical abilities never improved beyond a light to sedentary level ...
>
> On February 20, 2020 Katharine Kazakoff was advised via letter that she would be cleared for full duties by WCB for her compensable occupational injury ... after completion of the WCB Tertiary Program on March 12, 2020 and that they would not be extending her claim any further...
>
> Upon completion of the WCB Tertiary Program and claim, Management at QSI Interiors Ltd. spoke with Katharine Kazakoff about returning to the work-site for her hired position as Taper. Katharine Kazakoff advised that she would be physically unable to perform those tasks ... Katharine Kazakoff had not been hired for an office position and there were not any sedentary office positions available in order for QSI Interiors Ltd. to attempt to further accommodate. Due to Katharine Kazakoff's inability to perform the tasks of a Taper, she was subsequently laid off from her position on March 18, 2020.
>
> ... There was never, at any point during Katharine Kazakoff's course of employment, that anyone in Management or at the office made reference or inference to any physical acts of violence towards her.

III. WITNESSES

[14] Three witnesses testified at the hearing, namely, the Appellant, Katharine Kazakoff; and for the Respondent, Miranda Wasstrom (Corporate Safety Facilitator) and Jamie Stercl (Manager of the Regina Branch). The witnesses gave evidence on oath or affirmation.

Katharine Kazakoff

[15] At the outset of her evidence, Katharine Kazakoff testified that she was laid off without being allowed to complete her return to work program. She stated, "That's my bone to pick".

[16] Ms. Kazakoff referred in that regard to a letter dated February 18, 2020 from Queen City Physiotherapy to Joe Baumgartner (Safety Facilitator at the Respondent's Regina Branch) setting out a graduated return to work plan with restrictions that continued up and including to March 24, 2020. Ms. Kazakoff observed that she was laid off prior to March 24, 2020, specifically, on March 18, 2020. She noted that there were no hours recorded on her daily time sheet for March 18, 2020, a document she was required to fill out as part of the job.

[17] As another "bone to pick", although not appearing in the complaint, Ms. Kazakoff stated without going into detail that the Respondent added pounds to the maximum weight limits for lifting as set out in the return to work plan and assigned her to tasks in the office at times she ought to have been on a job site.

[18] Ms. Kazakoff then spoke to the page headed up "Wed 16th July –2019" (quoted above) which is appended to her complaint. She described it as an excerpt from her diary. She testified,

"Jamie said punch me out". She further testified that she did not feel comfortable when she went to work after that.

Miranda Wasstrom

[19] Miranda Wasstrom, corporate safety facilitator for the Respondent, began her evidence by disputing the Appellant's assertion that the Appellant was laid off without being allowed to finish her back to work program.

[20] In that regard, Ms. Wasstrom noted that the letter dated February 18, 2020 from Queen City Physiotherapy, relied upon by Ms. Kazakoff in her evidence, was in fact replaced by a letter dated February 24, 2020 from Queen City Physiotherapy in which restrictions continued only to March 13, 2020 (not March 24, 2020) and in which regular duties were specified for March 16-18, 2020. Ms. Wasstrom explained that the February 24, 2020 letter was sent in light of a letter dated February 20, 2020 from the Workers' Compensation Board (WCB) to Ms. Kazakoff (copied to the Respondent) declining to extend the return to work program. The timing was further made clear by the WCB in a letter dated April 21, 2020, identified by Ms. Wasstrom, referring to the completion of treatment on March 12, 2020 and a return to pre-injury job duties.

[21] Ms. Wasstrom testified that upon completion of WCB return to work program, Ms. Kazakoff was not physically able to perform her previous work and resume her duties as a Taper. Ms. Wasstrom testified that because of this, and with no office positions available for attempted further accommodation, the company laid off Ms. Kazakoff on March 18, 2020.

[22] Ms. Wasstrom further stated that the company denies the allegation of statements of violence contained in the complaint.

Jamie Stercl

[23] Jamie Stercl, Regina branch manager, in examination in chief, was referred to the page of the complaint labelled "Wed 16th July – 2019" and asked to respond. Mr. Stercl testified that he never said he would like to "punch out that sub drywaller" or that he would like to punch out anyone. He also noted that the Regina office has not used subcontracted drywallers which made him pretty confident he wouldn't even use the expression sub-drywaller. Asked about an employee named Tamara, Mr. Stercl indicated that Tamara was a clerical employee who worked at the front desk of the office and was laid off at some point.

[24] In cross-examination, related to the assertion in the complaint about the delivery of a note to Don Hale (field supervisor who is now retired), Mr. Stercl was asked about discussions he would have with Don Hale and Joe Baumgartner. In response, Mr. Stercl stated that "neither made any reference to my stating that I would punch out someone". He also testified that it was quite clear that the back to work plan had been completed before the layoff.

IV. LEGISLATIVE PROVISIONS

[25] The provisions of the Act relevant to this appeal include those set out below:

3-1(1) In this Part and in Part IV:

(i) **"discriminatory action"** means any action or threat of action by an employer that does or would adversely affect an employee with respect to any terms or conditions of employment or opportunity for promotion, and includes termination, layoff, ...;

3-35 No employer shall take discriminatory action against a worker because the worker:

(a) acts or has acted in compliance with:

(i) this Part or the regulations made pursuant to this Part ...

(b) seeks or has sought the enforcement of:

(i) this Part or the regulations made pursuant to this Part ...

3-36(1) A worker who, on reasonable grounds, believes that the employer has taken discriminatory action against him or her for a reason mentioned in section 3-35 may refer the matter to an occupational health officer.

(2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve a notice of contravention requiring the employer to:

(a) cease the discriminatory action;

(b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;

(c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and

(d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.

(3) If an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 3-35, the occupational health officer shall advise the worker of the reasons for that decision in writing.

(4) If discriminatory action has been taken against a worker who has acted or participated in an activity described in section 3-35:

(a) in any prosecution or other proceeding taken pursuant to this Part, there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 3-35; and

(b) the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason. ...

For a discussion of the workings of these sections of the Act, see the adjudication decision in *Northern Village of Buffalo Narrows and Hanson*, LRB File No. 152-21, November 29, 2022, at paras. 57 to 63.

[26] In addition, building on section 3-8 of the Act aimed at ensuring, insofar as reasonably practical, that workers are not exposed to harassment, section 36 of *The Occupational Health and Safety Regulations, 1996* at the material time (since replaced and consolidated with other

regulations) required an employer to develop a policy on harassment that includes various elements set out in the section and to implement that policy.

V. ISSUES

[27] The issues on this appeal are the following:

- Did the Appellant engage in a protected activity that falls within the ambit of s. 3-35 of the Act?
- If so, was the Respondent's layoff of the Appellant (being a "discriminatory action" as defined) taken for good and sufficient other reason within the meaning of s. 3-36(4) of the Act?

VI. DETERMINATION

[28] The Appellant stated in the complaint "I feel that Jamie layed me off and he never let me finish my tertiary program through the WCB physio therapist". At the hearing the Appellant pursued her contention of not being allowed to finish the WCB return to work plan. The evidence does not support the contention, just the opposite. The documentary record as reviewed by Ms. Wasstrom shows that the return to work plan had been completed prior to the layoff. The layoff itself, however, constituted "discriminatory action" as defined in section 3-1(1) of the Act.

[29] Referring to a page from her diary headed up "Wed 16th July – 2019" (July 16th that year was actually a Tuesday), the Appellant testified that she overheard Jamie Stercl say, "I would like to punch out that sub drywaller". Mr. Stercl denied that he made such a statement about the Appellant or anyone else. It is not necessary for me to make a finding as to whether those words were used or not, or whether (as could have been the case) the Appellant may have misheard other words that were spoken. Sections 3-35 and 3-36 of the Act do not provide a forum for adjudicating harassment complaints.

[30] What matters for present purposes is whether there was a complaint or report of harassment by the Appellant under the terms of the applicable harassment policy.[1] In the adjudication decision in *Banff Constructors Ltd. and Arcand*, LRB File No. 184-19, April 28, 2020, an employee made a complaint to the employer related to conduct on the part of his supervisor that the employee believed was harassment. The adjudicator at para. 48 said that, "In doing so, he was seeking the enforcement of the Act and the regulations pertaining to harassment, which is an activity protected by s. 3-35". I agree with this interpretation.

---

[1] The Respondent's violence and harassment prevention policy dated March 30, 2023 was provided in response to a request by the Occupational Health Officers in their May 17, 2023 letter for a copy of the current harassment policy and was filed at the hearing along with the Respondent's letter of May 25, 2023. It requires employees to "immediately report all incidents of workplace violence/harassment to their supervisor". A copy of the Respondent's policy as it existed at the material time was not filed at the hearing. However, clause 36(1)(e) of *Occupational Health and Safety Regulations, 1996* required the inclusion of a provision containing "an explanation of how complaints of harassment may be brought to the attention of the employer".

[31] Evidence that the Appellant in July 2019 in fact delivered a note to her supervisor as alleged in her March 2023 complaint is not strong or at least was not fully developed at the hearing. The Appellant states in the complaint (albeit largely overlooking this in her testimony) that two days after the incident she spoke with Don Hale, field supervisor, and gave him a note on what happened. Mr. Hale, now retired, was not called as a witness. Mr. Stercl in cross-examination was adamant that in the discussions he had with Mr. Hale and Mr. Baumgartner neither of them made any reference to Mr. Stercl stating he would punch out someone.

[32] Even assuming, however, that a note as described was delivered to Mr. Hale on or about July 16, 2019, I find that the Respondent did not, eight months later, on March 18, 2020, layoff the Appellant because of this protected activity but rather for good and sufficient other reason. Considerations in that regard include the fact that the WCB return to work program, after one year, had run its course and was completed as of March 12, 2020, with regular duties set to commence on March 16, 2020; the Appellant was not physically able to resume her previous work; the Respondent was not in a position to provide an office position to the Appellant; and the manager who effected the layoff, Jamie Stercl, whose evidence I accept in this regard, was not even aware from Mr. Hale or otherwise of any note or report of violence/harassment from an incident involving himself and the Appellant.

VII. ORDER

[33] Pursuant to section 4-6(1) of the Act, the appeal is dismissed.

Dated this 18th day of June, 2024.

Larry LeBlanc

Larry B. LeBlanc, K.C., Adjudicator